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7 Portfolio Recovery Associates, LLC

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MARIÀ CAUDILLO.

Plaintiff,

vs.

## PORFOLIO RECOVERY ASSOCIATES, LLC,

**Defendant.**

) CASE NO.: 12-cv-00200-GPC-RBB

**DEFENDANT'S MEMORANDUM OF  
CONTENTIONS OF FACT AND  
LAW, ABANDONED ISSUES, TRIAL  
EXHIBITS AND WITNESS LIST**

**[LOCAL RULE 16.1(f)(2) AND FRCP  
26(a)(3)]**

## The Honorable Gonzalo P. Curiel

1 Pursuant to the Court's Minute Entry entered on September 6, 2013 (Docket  
 2 No. 42), confirming the Final Pretrial Conference for October 11, 2013 and Civil  
 3 Local Rule 16.1(f)(2), Defendant PORTFOLIO RECOVERY ASSOCIATES, LLC  
 4 ("PRA"), hereby submits the following Memorandum of Contentions of Fact And  
 5 Law, Abandoned Issues, Trial Exhibits and Witness List:

6 **A. MEMORANDUM OF CONTENTIONS OF FACT AND LAW**

7 **Contentions of Fact:**

8 Plaintiff Maria Caudillo opened a credit card account with Wells Fargo ending  
 9 in 7667 (the "Account") and incurred a financial obligation through her use of the  
 10 Account. Ms. Caudillo was the sole authorized user on the Account – no other person  
 11 used it. She understood her Account would be subject to a written agreement, and  
 12 had no reason to believe that she did not receive an agreement from Wells Fargo.

13 Wells Fargo mailed monthly statements for the Account to Ms. Caudillo at her  
 14 home address of 1137 Glendening Ct., Brawley, CA 92227-7743. Those Account  
 15 statements included one with a closing dated of October 13, 2008, stating that the  
 16 balance on the Account was \$4,845.61.

17 Ms. Caudillo was unable to pay the minimum monthly payments on the  
 18 Account, and she eventually stopped making payments altogether without paying the  
 19 Account in full.

20 Ms. Caudillo never contacted Wells Fargo to dispute any of the charges, fees,  
 21 or interest that had been applied to the Account.

22 When PRA acquired the Account from Wells Fargo on June 30, 2009, the  
 23 unpaid balance was \$4,845.91.

24 PRA sent an initial demand letter to Ms. Caudillo on July 10, 2009, addressed  
 25 to her at 1137 Glendening Ct., Brawley, CA 92227-7743. The letter informed her  
 26 that PRA had purchased her Account from Wells Fargo.

27 A second letter was sent to Ms. Caudillo on November 6, 2009, informing her  
 28 that the Account had been transferred to PRA's litigation department.

On January 26, 2010, PRA sent a third letter to Ms. Caudillo which contained another notice that the Account had been transferred to PRA's litigation department. None of the letters sent to Caudillo were returned to PRA as undeliverable.

The Account was later referred to CIR Law Offices ("CIR") for collection, and CIR was authorized to proceed with litigation if the firm deemed it appropriate.

CIR prepared a complaint on behalf of PRA and filed it on July 21, 2011, in San Diego County Superior Court (the "State Complaint").

Ms. Caudillo was served with the State Complaint and the summons on August 2, 2011.

The State Complaint was a California Judicial Council form complaint which asserted a single cause of action for "Common Counts" – including counts for open book account, account stated, goods sold and delivered and money lent. Each of the "Common Counts" were alleged by checking the corresponding box on the form complaint. The text next to one of the boxes left unchecked in the form complaint reads as follows:

**(6) [ ] other (specify): for credit card purchases and/or cash advances on the credit account issued by Plaintiff for which Defendant was billed monthly and failed to dispute as required under the Federal Fair Billing Act applicable to such account (IS USC Section et Seq.).**

Ms. Caudillo could not recall when she first received or read the State Complaint. She admittedly did not even attempt to read the language of the summons and only skimmed the State Complaint without paying any attention to detail. She then ignored the State Complaint and summons for a number of weeks and did not attempt to read it again until after her mother's repeated requests that she review them in detail.

Ms. Caudillo understood that any allegation next to an unchecked box was not being alleged by PRA. Consistent with this understanding, she ignored the allegations in the State Complaint that were not checked with an "X."

1 Ms. Caudillo understood that PRA filed the State Complaint because it was  
 2 seeking to collect money from her. Despite this, she never tried to contact PRA in  
 3 order to ask questions about the financial obligation it was trying to collect from her.

4 Ms. Caudillo knew after reading the State Complaint that she has to respond to  
 5 it and that it was something she could not ignore because it was a serious matter.  
 6 She understood that if she did not respond, PRA might get a judgment against her in  
 the lawsuit.

7 Ms. Caudillo then retained attorney Stephen Recordon hired an attorney to  
 8 respond to the Complaint for her.

9 Ms. Caudillo never paid any money to her attorneys or to the state court and  
 10 that she will not have to pay her attorneys any money for the work they did in the  
 11 state court action.

12 Ms. Caudillo's claims are all based on the contents of the State Complaint.

13 Ms. Caudillo has not incurred any actual damages as a result of the State  
 14 Complaint that was filed against her.

15 There is no basis for awarding any statutory damages to Ms. Caudillo under  
 16 the FDCPA or under the Rosenthal Act.

17 **Contentions of Law:**

18 To determine whether any statutory damages should be awarded under the  
 19 FDCPA, the court must consider "the frequency and persistence of noncompliance  
 20 by the debt collector, the nature of such noncompliance, and the extent to which such  
 21 noncompliance was intentional." *See* 15 U.S.C. § 1692k(b)(1); *see also Jerman v.*  
*22 Carlisle, et al.*, 2011 WL 1434679 (N.D. Ohio April 14, 2011) (awarding zero  
 23 statutory damages to plaintiff and class after plaintiff prevailed on liability in the  
 24 Supreme Court).

25 A consumer may not recover any statutory damages under the Rosenthal Act in  
 26 the absence of evidence that the collector "willfully and knowingly" violated the  
 27 statute. *See* Cal. Civ. Code § 1788.30(b).

**B. ABANDONED ISSUES**

The issue of liability under the FDCPA and the Rosenthal Act for violations of FDCPA section 1692e has been determined against PRA pursuant to the Court's Order dated August 13, 2013 (Docket No. 36).

**C. EXHIBITS**

Defendant expects to offer the following exhibits at trial (other than exhibits used for purposes of impeachment):

<u>Exhibit Number</u>	<u>Description</u>
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A. Records obtained by PRA relating to the unpaid Wells Fargo account of Ms. Caudillo ending in 7667.

B. Complaint, Summons, and Proof of Service of Summons filed in the State Court action, styled as *Portfolio Recovery Associates, LLC v. Maria Caudillo*, San Diego Superior Court, Case No. 37-2011-00077933-CL-CL-SC.

C. Answer to the complaint filed in the State Court action, styled as *Portfolio Recovery Associates, LLC v. Maria Caudillo*, San Diego Superior Court, Case No. 37-2011-00077933-CL-CL-SC.

D. Docket Report for the State Court action, styled as *Portfolio Recovery Associates, LLC v. Maria Caudillo*, San Diego Superior Court, Case No. 37-2011-00077933-CL-CL-SC.

E. Letter dated July 10, 2009, from PRA to Maria Caudillo

F. Letter dated November 6, 2009, from PRA to Maria Caudillo.

G. Letter dated January 26, 2010, from PRA to Maria Caudillo.

H. Defendant's Requests For Admission To Plaintiff, Set One.

I. Plaintiff's Responses To Defendant's Requests For Admission, Set One.

J. Defendant's Requests For Production Of Documents, Set One.

K. Plaintiff's Responses To Defendant's Requests For Production Of Documents, Set One.

L. Defendant's Requests For Production Of Documents, Set Two.

1 M. Plaintiff's Responses To Defendant's Requests For Production Of  
2 Documents, Set Two.

3 N. Defendant's Interrogatories To Plaintiff, Set One.

4 O. Plaintiff's Responses To Defendant's Interrogatories, Set One.

5 P. Declaration Of Maria Caudillo, Docket 28-2.

6 Q. Transcript and Exhibits of the March 26, 2013, deposition of Maria  
Caudillo.

7 R. PRA Internal account records reflecting collection activity on the  
8 Caudillo Account.

9 S. Bankruptcy Petition And Schedules of Maria Caudillo.

10 **D. WITNESSES**

11 Defendant expects to offer at trial (other than for purposes of impeachment)  
12 the following witnesses:

13 1. Maria Caudillo. 2611 East 14th Street, National City, CA 91950

14 2. Ralph Mesisco. Portfolio Recovery Associates, LLC, 140 Corporate  
15 Boulevard, Nofolk, VA 23502.

16 3. Tara Muren. CIR Law Offices, LLP. 8665 Gibbs Drive, Suite 150, San  
17 Diego, CA 92123.

18  
19 DATED: September 13, 2013

SIMMONDS & NARITA LLP  
TOMIO B. NARITA  
ARVIN C. LUGAY

20  
21 By: s/Tomio B. Narita

22 Tomio B. Narita  
23 Attorneys for Defendant  
24 Portfolio Recovery Associates, LLC.  
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26  
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1 I, Tomio B. Narita, hereby certify that:

2 I am employed in the City and County of San Francisco, California. I am over  
3 the age of eighteen years and not a party to this action. My business address is 44  
4 Montgomery Street, Suite 3010, San Francisco, California 94104-4816. I am counsel  
5 of record for the defendant in this action.

6 On September 13, 2013, I caused the **DEFENDANT'S MEMORANDUM**  
7 **OF CONTENTIONS OF FACT AND LAW, ABANDONED ISSUES, TRIAL**  
8 **EXHIBITS AND WITNESS LIST** to be served parties listed below via the Court's  
9 Electronic Filing System:

10 **VIA ECF**

11 Clinton J. Rooney  
[rooneycdi@gmail.com](mailto:rooneycdi@gmail.com)  
12 Counsel for Plaintiff

13 Stephen G. Recordon  
[sgrecordon@aol.com](mailto:sgrecordon@aol.com)  
14 Counsel for Plaintiff

15 Joshua Swigart  
[josh@westcoastlitigation.com](mailto:josh@westcoastlitigation.com)  
16 Counsel for Plaintiff

17 I declare under penalty of perjury that the foregoing is true and correct.

18 Executed at San Francisco, California on this 13th day of September, 2013.

19 By: s/Tomio B. Narita  
20 Tomio B. Narita  
21 Attorneys for Defendant  
22 Portfolio Recovery Associates, LLC.  
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